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COPYRIGHT ARBITRATION ROYALTY PANEL
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In the Matter of)
Distribution of the 1998-1999) Docket No. 2001-8 CARP CD 98-99
Cable Royalty Funds)

**PROPOSED REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE PUBLIC TELEVISION CLAIMANTS**

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PROPOSED REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE PUBLIC TELEVISION CLAIMANTS

Most of the points raised by the opposing claimants in their proposed findings and conclusions have been anticipated and addressed in detail in Public Television's proposed findings and conclusions, and we do not repeat that discussion here. Rather, in this reply, we discuss and rebut certain assertions and arguments that require more full and detailed explanations.

I. PUBLIC TELEVISION OFFERS THE MOST REASONABLE AND COMPREHENSIVE MODEL FOR DETERMINING THE AWARDS OF ALL CLAIMANTS BASED ON RELATIVE MARKETPLACE VALUE AND CHANGED CIRCUMSTANCES.

1. Public Television is the only claimant to propose a methodology for estimating the share of each major claimant group by using all of the measures historically relied upon in prior proceedings. Both the CRT and the 1990-92 CARP rejected proposals to base awards on just one quantitative measure, choosing instead to incorporate multiple measures in their determinations. As discussed more fully at PTV F&C ¶¶ 473-474, 480-481, 553-555, the Bortz and Nielsen studies (and, in PTV's case, instances of carriage) have been used to establish a "zone of reasonableness" for determining the relative marketplace value of the major program categories. Changes in these measures have then been used to fine-tune the awards, with even small changes in the measures serving as bases for sizeable increases (or decreases) in awards from prior years. PTV F&C ¶¶ 475, 556-559, 581-582, 585, 587-588.

2. Only the Public Television and Commercial Television Claimants put forward reasoned methodologies for determining PTV's share that rely on measures of relative marketplace value rather than fee-generated formulas.¹ As explained more fully in ¶¶ 4-20 below, fee-generated formulas have been repeatedly rejected because they run counter to the logic and precedent of setting awards based on relative marketplace value. Moreover, the testimony of witness after witness established as a matter of fact, based on the evidentiary record in this proceeding, that fees generated by a particular distant signal are not a proper measure of relative marketplace value.

3. The Program Suppliers implicitly recommend an award to the Joint Sports Claimants of approximately 12.3 percent of the Basic Fund -- a dramatic decline from Sports'

¹ The Canadian Claimants propose that PTV be awarded its Bortz share, but fail to make the necessary adjustments identified by Dr. Fairley. See CC F&C pp. 56-58, Apps. B, D. The Commercial Television Claimants make some of the adjustments proposed by Dr. Fairley, but do not incorporate into their proposed PTV award the results of Dr. Fairley's Method 1, the Nielsen viewing shares, or subscriber instances, and thus underestimate the relative value of PTV programming. See NAB F&C ¶ 236, Proposed Allocation Calculation Methods ¶¶ 1-8, 10-11.

1990-92 award of 28.2 percent. PS F&C p. i (Introduction).² If Program Suppliers' methodology for determining the parties' shares is to be taken seriously, it must produce reasonable results for all claimant groups; if the Panel believes that JSC's proposed share is too low, then Program Suppliers' entire model must fail. Unfortunately, the Program Suppliers are silent as to the reasons behind the steep decline in the JSC share implicit in their proposals, presumably because their settlement agreement with JSC prohibits them from attacking JSC directly. See PS F&C p. i n.1. The Panel and all the smaller claimants are denied the opportunity to see what JSC's historic and most well-financed rival in these proceedings really believes about the quality and reliability of JSC's evidence. The implicit proposal for a 12.3 percent award nevertheless provides a glimpse into the Program Suppliers' assessment of JSC's case.

II. PROPOSALS TO LIMIT PTV'S AWARD TO FEES GENERATED ARE FLATLY INCONSISTENT WITH THE LOGIC AND PRECEDENT OF SETTING AWARDS BASED ON RELATIVE MARKETPLACE VALUE.

4. Both the Joint Sports Claimants and the Program Suppliers acknowledge that relative marketplace value is the "only logical and legal touchstone" for this Panel's award determinations. JSC F&C pp. 4-5 (1990-92 CARP "correctly concluded that . . . '[m]arket value' is the only logical and legal touchstone"); PS F&C p. 148 ("Based on royalty distribution precedent, the task for this Panel is to determine the relative marketplace value of the programming categories by simulating a free market for distant signal programming."). Yet, despite this clear guiding principle, both JSC and Program Suppliers nonetheless assert that PTV's award should be limited to the fees paid by cable operators for carriage of PTV stations (see JSC F&C pp. 38-42, ¶¶ 338-345, 366; PS F&C pp. 213-14, 218-19) -- an approach that has been repeatedly rejected in past proceedings because it does not measure relative marketplace value (PTV F&C ¶¶ 305-307, 500) and that witness after witness confirmed does not reflect true marketplace value (PTV F&C ¶¶ 308-320, 501-503). Applying a fee-generation model to determine PTV's award would be flatly inconsistent with the logic of setting awards based on relative marketplace value, with every prior cable royalty decision, and with the extensive evidence in this record that the statutory fees do not measure relative value.

5. The Copyright Act requires that this Panel "act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)." 17 U.S.C. 802(c).

² The implicit proposed share for JSC is calculated by adding the Program Suppliers' recommended shares for the other claimants plus the 1.2 percent Devotional settlement share and subtracting that total from 100.

6. Here, precedent is clear: fee-generated formulas have been repeatedly rejected as a means for determining awards:³

- “Because we find that the rate the cable systems pay under compulsory license is not a clear or true reflection of the direct marketplace value of the work, additional considerations, adjusted as appropriate, were used by the Tribunal to determine the marketplace value of the copyright owner’s work.” *1978 Cable Royalty Decision*, 45 Fed. Reg. 63026, 63036 (Sept. 23, 1980);
- “We also have declined to employ fee-generated formulas, as urged upon us by the Canadians.” *1979 Cable Royalty Decision*, 47 Fed. Reg. 9879, 9894 (Mar. 8, 1982);
- “[T]he request [for a fee-generated award] is based upon a methodology which the Tribunal has repeatedly indicated fails to lend itself to an application of the Tribunal’s criteria.” *1980 Cable Royalty Decision*, 48 Fed. Reg. 9552, 9569 (Mar. 7, 1983);
- “[W]e have rejected fee generation formulas as a mechanical means toward making our allocations.” *1983 Cable Royalty Decision*, 51 Fed. Reg. 12792, 12808 (Apr. 15, 1986).

7. No prior panel has ever based its award to PTV on the fees generated by the carriage of PTV stations. The 1990-92 CARP specifically rejected that approach, even though the Canadian Claimants urged the CARP to adopt it in determining PTV’s share. The 1990-92 CARP did not mention or use a fee-generated model in making PTV’s award and stated that it “did not wish to use a fee generation method” and “tried to distance ourselves” from it, but nevertheless used the method for the narrow purpose of determining the Canadian Claimants’ award, given that no claimant group objected to the amount of the award and there was little other evidence in the record. PTV F&C ¶ 307; 90-92 CARP Op. 141; 61 Fed. Reg. 55653, 55667 (Oct. 28, 1996).

8. This is not a situation where new evidence has been presented demonstrating that past decisions rejecting the fee-generated approach were incorrect. The fees-generated method has been around since the time these proceedings began. Tr. 7126 (Martin) (fee-generated data provided for “last 20-some years”). Its repeated rejection confirms that fees generated do not reflect actual marketplace value and therefore cannot be used in determining awards, particularly where, as here, ample evidence of relative marketplace value has been introduced by the parties.

³ The Program Suppliers do not even mention these precedents in their proposed findings; the Joint Sports Claimants merely acknowledge, without attempting to distinguish the decisions, that “[t]here are passages in prior cable royalty distribution decisions where the CRT or the prior CARP disavowed fee generation.” JSC F&C ¶ 343.

9. Numerous witnesses -- including expert economists testifying for the Joint Sports Claimants and the Program Suppliers -- have conceded that the fees generated by a particular distant signal do not reflect the relative marketplace value of that signal. PTV F&C ¶¶ 308-320, 501-503. The record is entirely uniform on this point -- every witness who addressed the issue testified that the amounts paid under the compulsory license do not measure the actual or relative marketplace value of any distant signal. Illustrative excerpts from the testimony of various witnesses are set out below.

- **Dr. Robert Crandall** (Joint Sports Claimants) (Tr. 803)

Q. I take it that you would agree with me that the value of particular signals of programming could readily exceed the amount that a cable operator has to pay as a compulsory license?

A. Yes

(Tr. 804)

Q. . . . [T]hese relationships reflected in the compulsory license were established by statute in the late '70s; is that right?

A. Yes.

Q. And so when a cable operator confronts a decision today about whether or not to take a particular distant signal, it could readily be seen that the value of that distant signal to the cable operator could be far in excess of what it has to pay to get that particular signal?

A. It could be.

(Tr. 819)

Q. . . . I think we agreed at the outset that the value for a particular kind of channel carried could be substantially greater than the amount paid as a compulsory license fee?

A. Yes.

Q. And in fact the relative value for one particular kind of channel could be substantially higher in relative terms than the value of the other?

A. Sure, there could be different relative valuations of different kinds of signals --

Q. And if you are doing a determination of awards based on relative value, you can't rely on the amounts paid in to figure out what the award should be based on relative value can you?

A. No, and I don't think any of it is. You apply those relative amounts to the total pool.

(Tr. 825)

Q. . . . [T]he relative value can be quite different from the relative amounts paid in under a compulsory license?

A. Yes.

- **Dr. Thomas Hazlett** (Joint Sports Claimants) (Tr. 1199-1200)

Q. . . . I take it you would agree with me that's sensible to expect, that there could be a value substantially in excess of what the compulsory license fee is.

A. Yes.

Q. Because the compulsory license fee was set by Congress 25 years ago, right?

A. Correct.

Q. And so the relationships in the compulsory license fee may not correspond with marketplace value of different signals, right?

A. Correct.

Q. And so you could have a situation where you have for one signal a greater divergence between the compulsory license fee and the value than you do for some other signal. Make sense?

A. Yes.

(Tr. 1213)

Q. So you would agree with me that you can't simply look at the relative DSEs to decide on the relative values of different signals.

A. You can't simply look at that. Of course not.

- **Mr. James Trautman** (Joint Sports Claimants) (Tr. 10295)

Q. I take it you would agree with me that the fair market value of a particular signal carried by a cable operator could be in excess of the statutory fee it has to pay to secure the signal?

A. Well, I think that could be true for any signal, yes.

- **Dr. Arthur Gruen** (Program Suppliers) (Tr. 7957-58)

THE WITNESS: . . . I would think [that the value of a PTV signal] would certainly be greater [than the quarter DSE paid for that signal], otherwise [the cable operator] wouldn't have done it. The operator wouldn't have done it and I guess the other question is which is also conceivably possible that relative to all the other distant signals that they may have, PTV could be more -- relatively more valuable than the cost or relatively less valuable or at least equal to. It could be more, but not necessarily more.

JUDGE GULIN: So if there are 10 such situations, you add up all the fees that those 10 paid, those total fees are going to be less than the total value to those 10 operators.

THE WITNESS: That's correct. And I guess to make the appropriate comparison, we'd have to add up the fees for all the other stations and then do some kind of an allocation, but I would expect that would be true for all categories. Some more so than others, not necessarily to the same degree because the prices are in one sense artificial or not market determined.

(Tr. 10522)

Q. . . . [T]he statutory fee structure is something different from marketplace value, as you have stated in your testimony.

A. Yes, it probably would be.

(Tr. 10523)

Q. . . . [T]he fact that you can identify statutory fees associated with a given category doesn't mean that those statutory fees are the same as the marketplace value for that category.

A. That's correct.

(Tr. 10526)

JUDGE VON KANN: I think Mr. Hester asked a moment ago about whether the statutory royalty may understate PTV's value, and I think you said, yes, and that may be true of other claimant groups as well, correct?

A. Yes.

(Gruen R.T. 4)

The royalty rates were established by Congress and not determined in the marketplace.

- **Mr. Jack Valenti** (Program Suppliers) (Tr. 6206-07)

A. . . . [T]he compulsory license . . . offers to cable systems first class programming at way below realistic marketplace value, but that's the way the Congress decided it.

- **Mr. David Bennett** (Canadian Claimants) (Tr. 5473)

Q. And I take it in the hypothetical that Mr. Stewart showed you earlier today the relative value of a public television signal could exceed the amount that's actually paid in; isn't that correct?

A. That's correct.

Q. So, for example, Congress could set a statutory rate of . . . 0.25 DSE and in fact a cable operator could value that signal at 0.5 DSE or 1 DSE or even more than that, we really don't know; is that correct?

A. That's correct.

(Tr. 5489-90)

Q. Mr. Bennett, under the statutory royalty structure a cable operator does not have to decide how much it is willing to pay to import a particular distant signal; is that correct?

A. That's correct.

Q. And the cable operator pays a fixed statutory fee set by Congress that could be substantially less than what it is willing to pay to import the distant signal, correct?

A. That's correct.

- **Dr. Leland Johnson** (Public Television Claimants) (Tr. 9138)

A. . . . The critical thing is that there is . . . no clear relationship between marketplace values and the values that were mandated in congressional legislation for the payment of royalties by PTV and other categories. . . .

- **Mr. Paul Much** (Commercial Television Claimants) (90-92 Tr. 2449-50)

Q. So if the question is undertaking an assessment of relative valuation among the different types of programming being imported, can the differing amounts paid in be an indicator of what the relative valuation is among those programming categories?

A. No.

10. While conceding that "[t]here are passages in prior cable royalty distribution decisions where the CRT or the prior CARP disavowed fee generation," the Joint Sports Claimants nevertheless argue that awarding PTV its fee-generated share would be justified under the same reasoning supporting the exclusion of PTV from the 3.75 Fund. JSC F&C ¶ 343. But, as prior panels have noted, there is a clear distinction between distributing royalties from different funds as compared to distributing royalties from within a single fund based on relative marketplace value. For example, in *1989-1991 Satellite Carrier Royalty Distribution Proceeding*, 57 Fed. Reg. 62422 (Dec. 30, 1992), cited by the Canadian Claimants (CC F&C p. 46), the CRT held that "the question of allocating royalties from within a single fund is clearly distinguishable from the question of allocating royalties from separate funds." 57 Fed. Reg. at 62426.

11. The Tribunal majority in the 1989-91 satellite distribution proceeding created different funds for signals for which payment was made at 12 cents (superstations) and signals for which payment was made at 3 cents (network stations).⁴ 57 Fed. Reg. at 62426. In doing so, it distinguished the award of royalties from these separate satellite funds (which it analogized to the 3.75 and Syndex cable funds) from the award of royalties from within the single cable Basic Fund, where problems arising from the sliding fee scale and the

⁴ Non-commercial stations were also paid for at the 3 cents rate. Those funds were not in dispute in the proceeding, and were not explicitly the subject of the Tribunal decision, because PBS had reached a settlement with the non-network copyright owners. 57 Fed. Reg. at 62423.

inclusion of Form 1, Form 2, and minimum fee royalties “preclude accurate calculation” of the fees generated by a particular station. *Id.* at 62425-26.⁵

12. The dissenting commissioner in the satellite distribution proceeding went even further, noting that the fee-generated approach “is illogical, contrary to fundamental fairness, and contrary to Tribunal precedent.” 57 Fed. Reg. at 62427. The commissioner, after reviewing the history of the 3.75 and Syndex Funds, observed that “[i]t is clear from the structure of the Copyright Act that the 3.75 and syndex rates (and therefore their corresponding distribution funds) are exceptions to the general distribution scheme reflected in the Basic Cable Fund, which is not subdivided into separate funds corresponding to different pay-in-rates according to station type.” *Id.* at 62428.

13. The Joint Sports Claimants argue that “[a]s a matter of simple equity, it is unfair for PTV to receive more than the fees it generates while all of the commercial claimants receive less.” JSC F&C p. 39; *see also* JSC F&C ¶ 339. In fact, however, there is nothing inequitable about this outcome, which is simply the logical consequence of allocating the royalty pool based on relative marketplace value. The diagrams in PTV Exhibits 9-X and 10-X, reproduced at ¶ 14, below, illustrate this simple principle. *See* Tr. 1198-1203, 1210-13 (Hazlett); PTV F&C ¶¶ 318-20.

14. The Program Suppliers make a similar argument that to award PTV a share greater than its fee-generated share “requires a finding that another category of programming is less valuable than the fees paid for its carriage.” PS F&C p. 219. But the Program Suppliers miss the point, focusing on the absolute value rather than on the relative value of the programming at issue. The diagrams in PTV Exhibits 9-X and 10-X, reproduced below, illustrate the principle that all distant signals carried by a cable system could be valued, in absolute terms, at more than was paid for them, but in relative terms a particular signal could be awarded less and another signal could be awarded more than was paid in royalties. In both examples, given the relative valuations among the signals carried, Signal A receives more than what was paid for it and Signal B receives less than what was paid for it, while both signals receive less than their absolute value to the cable operator.

⁵ Furthermore, the Tribunal’s fee-generation decision in the satellite proceeding was made solely on the briefs and without development of any evidentiary record. Here, the Panel has before it a voluminous evidentiary record on the reasons that the amounts paid for carriage of particular signals cannot be a measure of marketplace value or benefits to cable operators. PTV F&C ¶¶ 305-320, 500-503.

Example with three signals (PTV Ex. 9-X)

<u>SIGNAL</u>	<u>PAY IN</u>	<u>VALUE</u>
A	\$ 2	\$ 10 (20%)
B	8	15 (30%)
C	8	25 (50%)
TOTAL	18	50 (100%)

<u>SIGNAL</u>	<u>DOLLAR AWARD</u>
A	\$ 3.6 (20%)
B	5.4 (30%)
C	9 (50%)
TOTAL	18 (100%)

Example with two signals (PTV Ex. 10-X):

<u>SIGNAL</u>	<u>PAY IN</u>	<u>VALUE</u>
A	\$ 2	\$ 10 (40%)
B	8	15 (60%)
TOTAL	10	25 (100%)

<u>SIGNAL</u>	<u>DOLLAR AWARD</u>
A	\$ 4 (40%)
B	6 (60%)
TOTAL	10 (100%)

15. Even apart from the logic of basing awards on relative marketplace value, awarding one category more than its fee-generated share does not necessarily mean that another category will receive less than its fee-generated share. Approximately 25 percent of the Basic Fund comprises royalties paid by Form 1 and Form 2 systems and by systems that carry no distant signal programming at all. Because these fees cannot be tied to the carriage of any of the program categories at issue here, their inclusion in the Basic Fund makes it possible for all claimants to receive more than their fee-generated share. PTV F&C ¶¶ 2, 4-5, 8, 66-68, 323, 505, 598.

16. The Joint Sports Claimants' assertion (JSC F&C p. 39; *see also* JSC F&C ¶¶ 344, 377) that it would be "arbitrary to allocate royalties to the Canadians on a fee-generated and constant sum basis and not do the same for PTV" is similarly misplaced. For the reasons stated at PTV F&C ¶¶ 645-649, PTV does not believe that the Canadian Claimants' royalties should be based on a fee-generated formula, and has proposed an alternative methodology for determining their share. The Canadian award in the 1990-92 proceeding was based on the peculiar circumstance that the CARP lacked other record evidence to determine an award. The CARP specifically did not endorse fees-generated as an analytically sound basis for allocating royalty fees based on relative marketplace value, and its decision in these unique circumstances should not be used as the basis for extending a principle inconsistent with fair market value.

17. Both JSC and Program Suppliers argue that PTV is trying to have it both ways, in effect sharing in the royalties generated by WTBS in 1990-92, but now refusing to share in the loss of those royalties. JSC F&C p. 40, ¶ 365; PS F&C ¶¶ 447, 509, 514. The fundamental flaw in this argument is illustrated by the diagram in PTV Exhibit 10-X reproduced in ¶ 14, above. That diagram removes one of the distant signals shown on PTV Exhibit 9-X and illustrates the principle that, even though the total pool of royalties decreased because of the withdrawal of the signal, that withdrawal could nevertheless result in an increase in the award amount for one of the remaining signals because its value increased relative to the other signal(s) remaining in the pool. Both Dr. Hazlett and Dr. Gruen agreed with this basic principle. Tr. 1210-12 (Hazlett); Tr. 10533-37 (Gruen).

18. The Joint Sports Claimants concede that "PTV may have shown, on the whiteboards of the CARP room, that it might theoretically be entitled to more than its fee generated share of royalties." JSC F&C ¶ 340. However, JSC contends that PTV "failed to adduce any hard evidence that cable operators in fact value PTV signals more in relation to what cable operators pay for them than the other signals they carry." JSC F&C ¶ 340. What JSC fails to recognize is that the hypotheticals discussed above and in the testimony of Drs. Hazlett and Gruen demonstrate the logical fallacy of the fee-generated approach. It is not necessary to have hard evidence to reject an approach that is demonstrably at odds with the governing legal standard. A hypothetical, in this context, is a dispositive refutation of the fee-generated theory. Furthermore, the following evidence in the record demonstrates that on average cable operators value PTV signals more than other signals, relative to the amounts paid for them:

- A variety of quantitative measures -- from the Nielsen viewing shares, to subscriber instances, to adjusted Bortz shares under Methods 1, 2, and 3 -- all converge on a relative valuation for PTV much greater than PTV's fee-generated share. PTV F&C ¶¶ 561-594, 606-608.
- Whereas the most-sought-after movies, syndicated series, and sports programming are found on cable networks, premium channels, and on network television, the best children's, history, science, arts, documentary, and educational programming are all found on PTV. PTV F&C ¶¶ 87-98, 349-371, 382-408, 513-517. For this reason, the carriage of a distant PTV signal "fits" the needs of cable operators in offering a diverse menu of programming to their subscribers. PTV F&C ¶¶ 506-512, 527-535.
- Public Television offers important benefits to cable operators that are at least as valuable if not more valuable than those offered by other program categories. PTV F&C ¶¶ 98, 114-116, 375-455. PTV viewers are particularly avid viewers. PTV F&C ¶¶ 113, 430-436. When carried, the average minute of PTV programming is, on a relative basis, at least as highly valued if not more valued by cable operators than the average minute of non-PTV programming, particularly once live sporting events are excluded. PTV F&C ¶ 255. This is true even though PTV signals cost less than independent signals under the compulsory license. PTV F&C ¶ 3.

- When PTV is carried as a distant signal, it is highly valued in the Bortz survey, averaging 26.6 percent when PTV-only systems are included. PTV F&C ¶ 218. This percentage is much higher than PTV's fee-generated share.

19. The fact that PTV's raw Bortz share is similar to its fee-generated share (JSC F&C ¶ 341) is of no consequence. Dr. Fairley testified that the Bortz methodology is biased against PTV and that the raw Bortz shares need adjustment if they are to be of any use to this Panel. PTV F&C ¶¶ 160-220. Once adjusted, the Bortz share for PTV is three to four times higher than its fee-generated share. The fact that, when carried, the average Bortz valuation for PTV is 12 to 14 percent when PTV-only systems are excluded and 26.6 percent when PTV-only systems are included further undermines any notion that the relative valuation of PTV to cable operators is equal to or even close to PTV's fee-generated share. See PTV F&C ¶¶ 169, 218.⁶

20. Finally, the Program Suppliers contend that Dr. Johnson's testimony that PTV distant signals are roughly at "parity" with commercial distant signals "effectively precludes PTV from claiming fees in excess of what was paid for PTV carriage." PS F&C p. 219 n.20. But Program Suppliers ignore the fact that cable operators pay on average only a quarter as much for PTV programming as for commercial programming (0.25 vs. 1.0 DSE). If cable operators value PTV signals (where carried) roughly at parity with commercial distant signals, then, under the Program Suppliers' own logic, PTV should receive about four times its fees-generated share (*i.e.*, greater than or equal to the 12 percent share that PTV is seeking).

III. COMPARING NIELSEN VIEWING MINUTES TO NIELSEN QUARTER HOURS IS INVALID AND THEREFORE ANY CONCLUSIONS DRAWN FROM SUCH A COMPARISON ARE INVALID.

21. Certain findings and conclusions proposed by both Program Suppliers and JSC reveal the persistence of the misconception that the quarter hours of programming presented in the Nielsen study measure the availability of programming to viewers. PS F&C ¶¶ 384-397, pp. 169-75, 218; JSC F&C p. 24, ¶¶ 177, 240-242, 333.

22. Quarter hours as reported by Nielsen do not reflect and do not measure how broadly particular stations were carried as distant signals, but rather simply reflect the programming available according to the schedules of the stations in the Nielsen study. PTV F&C ¶¶ 277, 281; Tr. 7351-56 (Lindstrom); NAB F&C ¶ 97. Nielsen's reported viewing minutes, on the other hand, represent actual viewing of various programming categories and

⁶ JSC states that Dr. Johnson was "not surprised that cable operators would value PTV [in the Bortz survey] roughly equal to what was paid for those signals in terms of the DSE's carried." JSC F&C ¶ 214 (citing Tr. 9291-92 (Johnson)). But what Dr. Johnson actually said was "I don't find it either surprising or not surprising . . . I see these relationships, and I ask, what meaning do they have for me? And I'm perplexed. I do not see the relevance, at least immediately, of these relationships to our deliberations." Tr. 9292-93 (Johnson).

are significantly influenced by the extent to which particular broadcast signals are carried as distant signals. PTV F&C ¶ 277; NAB F&C ¶ 97. Accordingly, quarter hours and viewing minutes as reported by Nielsen are on different scales and simply cannot be compared as Program Suppliers and JSC attempt. PTV F&C ¶¶ 277-282.

23. Program Suppliers' own witness, Dr. Arthur Gruen, recognized during cross-examination, based on a series of examples, that a distant signal could have higher viewing minutes per quarter hour than another distant signal for each system on which it is carried, but could be less widely carried, so it would be important to know how widely a signal was carried. PTV F&C ¶ 279; Tr. 7840-50 (Gruen). Dr. Gruen agreed that if one were attempting to measure a program's appeal, it would be important to know if, for example, 4,000 people out of a potential audience of 5,000 were watching the program or 4,000 people out of a potential audience of 100,000 were watching. Tr. 7845-47 (Gruen). The Nielsen quarter hour numbers, however, do not reflect the potential audience for any category of programming.⁷ Tr. 7410 (Lindstrom); PTV F&C ¶ 281; NAB F&C ¶ 97.

24. Despite this clear record evidence that viewing minutes reported in Program Suppliers' Nielsen study are measured on an entirely different basis from the quarter hours of programming reported in the study, both Program Suppliers and JSC propose findings and conclusions based on simple mathematical ratios between these two sets of numbers.

- Program Suppliers insist without support and inaccurately that quarter hours measure "availability" of programming. PS F&C pp. 169-70, 174. They claim that viewing minutes per quarter hour measures viewership per program, which is analogous to ratings and quantifies avidity of viewers for programming. PS F&C ¶¶ 384-397, pp. 169-75, 218.
- JSC applies Dr. Gruen's "avidity" adjustments to household viewing data for 1992, 1998, and 1999, and claims that this and Dr. Gruen's adjustments to Nielsen viewing numbers show that sports programming has higher avidity than other programming, while PTV's avidity is lowest. JSC F&C p. 24, ¶¶ 177, 240-242, 333.

⁷ Program Suppliers claim that Mr. Lindstrom testified that ratings can be calculated from Nielsen's data. PS F&C ¶ 246. Mr. Lindstrom, however, only testified that viewing minutes were a "basic piece of the calculation" of ratings, and he further testified that it would be difficult to properly determine the audience base to calculate true ratings and that Nielsen had not done so for its study in this proceeding. Tr. 7221 (Lindstrom). Mr. Lindstrom later confirmed that it would be difficult to determine the potential audience for distant signals -- because it would be difficult to determine which of Nielsen's 4,200 households actually had access to distant signals -- and that Nielsen did not know what that audience was. Tr. 7409-11 (Lindstrom).

- JSC attempts to calculate households viewing an average programming minute by taking the ratio of Nielsen viewing minutes to quarter hours (multiplied by 15 to obtain minutes) and then multiplying that ratio by 20,000 (the approximate number of homes represented by a Nielsen household). JSC F&C ¶ 243.

25. Program Suppliers' rebuttal witness Alan Whitt illustrated the effect of not taking into account varying availability of distant signals. Mr. Whitt calculated the "unweighted" shares of programming time in the Fratrik time study presented by the Commercial Television Claimants. Whitt R.T. 2-5. The "unweighted" shares reflect the minutes of programming available by category without taking into account how many subscribers received distant signals, while Dr. Fratrik's shares were weighted by the number of distant signal subscribers for each of the stations included in the study. Whitt R.T. 2-3; Tr. 9550-52 (Whitt). Mr. Whitt showed that PTV programming accounted for 14.87 percent of all programming actually available to subscribers in Dr. Fratrik's study, but when the volume of programming on the stations in the study was simply totaled across the stations, PTV's share was 24.70 percent for 1998-99. Whitt R.T. 5 (Table 3). Thus, without taking account of availability to subscribers, PTV had a far higher share of programming than when availability was considered. The same effect may be seen in Nielsen's quarter hour figures in which PTV had 29.1 percent of quarter hours in 1998 and 30.6 percent in 1999, reflecting only the percentage of PTV programming available on the 179 and 180 stations in Nielsen's study each year. PS Exs. 20, 22. While the PTV quarter hours reflect the number of PTV distant signals included in the Nielsen sample, they do not reflect how widely or narrowly those PTV distant signals were available to viewers. Tr. 7351-56 (Lindstrom). Accordingly, the Nielsen quarter hour numbers simply don't provide a share comparable to the weighted share of the Fratrik study because Nielsen does not know how many households had access to a given signal in its study.⁸ Tr. 7410 (Lindstrom); PTV F&C ¶ 281.

26. Dr. Gruen's recalculation of his "avidity" adjustments in rebuttal testimony, in which he simply multiplied quarter hours by 15 to convert them to minutes -- purportedly applying the "Stewart Methodology" (Gruen R.T. 35-46) -- does not remedy the central flaw of his adjustments that quarter hours do not reflect the varying availability of programming. Furthermore, Program Suppliers' belated attempt to address the flaw in Dr. Gruen's calculations by providing new calculations based on Fratrik time study data (PS F&C pp. 170-74) must be rejected because Program Suppliers provide no basis for the validity of comparing viewing minutes from the Nielsen study to program time from the Fratrik study. In addition, the new calculations must be rejected because Program Suppliers provide them only for 18-49 viewing, when it has been shown that it is not proper to limit consideration of viewing data to that demographic. PTV F&C ¶¶ 287-292, 479; NAB F&C ¶¶ 86-92.

⁸ JSC contends that there is some significance to the difference between PTV's share of quarter hours in the Nielsen study and its share of distant signal programming time in the Fratrik study. JSC F&C ¶ 332. As has been shown, the two percentages are not comparable because the Nielsen quarter hours do not take account of potential audience, while the Fratrik study does.

27. When the Commercial Television Claimants presented calculations that reflected relative availability to potential viewers in order to address the flaw in Dr. Gruen's "avidity" calculations, the viewing percentages of the programming categories remained practically unchanged. PTV F&C ¶ 286; NAB F&C ¶ 98. For example, PTV had 16.0 percent of household viewing minutes and 16.7 percent of viewing by all viewers (2+) in Nielsen's 1998-99 study, and when viewing was compared to weighted available minutes, PTV's adjusted shares were 16.0 percent for household viewing and 16.8 percent for 2+ viewers. NAB Ex. 17-R.

28. It is thus clear that viewing minutes and quarter hours reported in the Nielsen study cannot properly be compared. PTV F&C ¶¶ 280-282; NAB F&C ¶ 97.

- Any attempt by Program Suppliers to quantify "avidity" by comparing Nielsen viewing minutes to quarter hours (or quarter hours multiplied by 15) as a measure of programming "availability" is fatally flawed in its method, and any conclusions drawn from such "avidity" adjustments to the Nielsen data therefore should be wholly rejected.⁹
- JSC's reliance on "avidity" adjustments as presented or suggested by Program Suppliers likewise should be wholly rejected.
- Despite JSC's claim that its calculation of households viewing an average program minute is not a mathematical avidity adjustment (JSC F&C ¶ 243), at the heart of the calculation is a comparison of Nielsen viewing minutes to quarter hours, and the entire calculation therefore is invalid.

29. Not only is the method of comparing viewing minutes to quarter hours as proposed by Program Suppliers and JSC fundamentally flawed, the concept of measuring "avidity" or intensity of interest for programming by using Nielsen viewing minutes also is fundamentally flawed. PTV F&C ¶¶ 106-116, 271-276; NAB ¶¶ 94-95. Dr. Gruen himself conceded that he was not measuring viewers' intensity of preference for any programming. PTV F&C ¶ 273. Evidence of actual avidity -- such as the WTBS study of viewer preferences; viewer donations; viewer response through letters, telephone calls, and e-mail; true ratings for children's programs; and evaluative surveys -- all indicate a high avidity for PTV programming. PTV F&C ¶¶ 106-116, 117-123, 430-436, 547-549.

⁹ Program Suppliers also contend that applying Dr. Gruen's adjustments to Nielsen data for 1992 shows that PTV's "appeal" declined from 1992 to 1999. PS F&C ¶ 408. However, if one ignores the fatal methodological flaw in Dr. Gruen's adjustment and applies the same viewing minutes per quarter hour adjustment to Program Suppliers' 1992 Nielsen data, the result shows that the appeal of Program Suppliers' programming declined by a factor of five from 1992 to 1999. Tr. 7930-31 (Gruen).

IV. ASSERTIONS THAT PARTIALLY DISTANT CABLE CARRIAGE IS THE RESULT OF MUST-CARRY REGULATION ARE NOT SUPPORTED BY THE RECORD.

30. Both Program Suppliers and JSC propose findings and conclusions regarding the effect of must-carry requirements on PTV that are simply not supported by the record.

- Program Suppliers claim that the increases in PTV instances of carriage and subscriber instances since 1992 are the result of must-carry requirements. PS F&C pp. 216-17.
- JSC claims that any increase in carriage of PTV signals is the result of an increase in the number of partially distant signals and asserts, without any record citation, that "approximately 30% of the PTV instances of distant carriage in 1998 and 1999 are largely attributable to the must-carry rules." JSC F&C p. 39, ¶¶ 216, 358.

31. At the heart of the contentions of Program Suppliers and JSC is the erroneous assumption that cable systems carried partially distant PTV signals because of must-carry regulation. In fact, the record does not support that assumption. Must-carry requirements passed in the 1992 Cable Act and implemented in 1993 required cable systems to carry local PTV broadcast signals. PTV F&C ¶¶ 73-74. The 1992 Act also imposed a "distant" must-carry requirement on cable systems with 13-36 channels and no local PTV signal, which had very limited application in 1998-99.¹⁰ PTV F&C ¶ 77. The 1994 Satellite Home Viewer Act expanded the local area for the purposes of the compulsory copyright license (to make it co-extensive with the local must-carry area), but it did not expand the local area for must-carry purposes. PTV F&C ¶¶ 78-79.

32. A cable system with partially distant carriage reflects the fact that some of its subscribers are distant and some are local with respect to a broadcast signal under the rules governing the compulsory copyright license. The fact that a cable system carries one or more partially distant signals, however, does not provide information about whether it is carrying those signals as the result of must-carry requirements or by choice. First, even if a cable system is subject to must-carry rules, that does not mean it would choose not to carry a PTV signal in the absence of such a constraint. PTV F&C ¶¶ 77, 235, 487. Second, based on the evidence in the record, one cannot determine from carriage data whether the system's headend is within the local must-carry area (and hence potentially carrying the signal because of must-carry requirements) or outside the local must-carry area (and unquestionably carrying

¹⁰ Program Suppliers' attempted explanation of the must-carry requirements for non-commercial broadcast signals (PS F&C p. 217) is confused and wrong. Cable systems that are partially distant, *i.e.*, have some subscribers that are distant and some that are local with respect to a broadcast signal, are not the result of the "distant" must-carry requirement for systems with 13-36 channels and no local PTV signal. PTV F&C ¶ 77.

the signal by choice). PTV F&C ¶ 81. No evidence was presented or cited by either Program Suppliers or JSC (or any other party) that established whether or not systems that had partially distant carriage of PTV signals had their headends within or outside the local must-carry area. PTV F&C ¶¶ 81, 487. Thus, there is no basis in the record for statements such as JSC's that cable operators carrying partially distant PTV signals are "likely subject to the must-carry requirements" (JSC F&C ¶ 216).

33. Furthermore, while the 1994 Act did not expand must-carry requirements, its expansion of the local area for compulsory copyright purposes caused some previously "fully distant" signals to become "partially distant" signals. PTV F&C ¶ 80. Any increase in cable systems carrying partially distant PTV signals as a result of the expansion of the local area for compulsory copyright purposes provides no information about compulsory carriage of PTV signals under must-carry regulations. PTV F&C ¶¶ 81, 487. Therefore, the 1994 Act's expansion of the compulsory copyright local area is clearly one significant reason why partially distant carriage increased between 1992 and 1998. No evidence was presented to separate the impact of the 1994 Act from the claimed impact of the must-carry requirements.

34. Further, even if a cable system is subject to must-carry rules, there is no basis in the record for assuming that it would not carry PTV signals absent the constraint, so the fact that must-carry regulation was enacted tells little or nothing about cable operators' choices. PTV F&C ¶¶ 77, 235, 487. JSC, moreover, has no basis in the record whatsoever to derive (at JSC F&C p. 39) a percentage of PTV signals carried in 1998-99 as a result of must-carry.¹¹

35. Program Suppliers attempt to bolster their contentions about must-carry regulation of PTV by citing Congressional testimony that was not admitted into the record for the truth of its assertions. PS F&C pp. 216-17 (citing JSC Ex. 57-RX). PTV moved to strike it to avoid any later uncertainty about whether the facts asserted are in evidence (and to avoid any later suggestion that it waived the issue by failing to object). *See Motion of Public Television Claimants to Strike Portions of Proposed Findings of Fact and Conclusions of Law*

¹¹ JSC provides no citation for its assertion that approximately 30 percent of PTV's carriage is attributable to must-carry regulation (JSC F&C p. 39), and there is no record support for that figure. Dr. Leland Johnson testified that any new effects from must-carry regulation implemented in 1993 on carriage of PTV signals by local cable systems -- such as an increase in cable systems with partially distant carriage of PTV signals -- would be seen immediately. Tr. 9245-46 (Johnson). From 1992, before must-carry regulation, to immediately after its implementation in 1993, instances of partially-distant carriage of PTV signals as a percentage of all carriage of PTV distant signals rose only 6 percent. Tr. 9246 (Johnson). The increase in PTV "partially distant" subscriber instances (*i.e.*, subscriber instances attributable to partially distant systems) between 1993 and 1999 was only 13 percent. Tr. 9246 (Johnson). Furthermore, even if a cable system were subject to must-carry rules, that does not mean it would have chosen not to carry a PTV distant signal in the absence of such a constraint. PTV F&C ¶¶ 77, 235, 487. Thus, the range of the increase in PTV subscriber instances possibly attributable to local must-carry requirements is between 0 and 13 percent. Tr. 9246-47 (Johnson).

Relying on Calculations and Testimony Not Admitted into the Record (filed Aug. 27, 2003). In any event, whether or not stricken from Program Suppliers' brief, those statements about cable market conditions in 1983 are not probative as to the vastly different market conditions of 1998-99, some 15 years later.

V. THE VARIOUS CRITICISMS OF DR. FAIRLEY'S METHODS AND ADJUSTMENTS ARE WITHOUT MERIT.

Both the Joint Sports Claimants and Program Suppliers criticize various aspects of Dr. Fairley's adjustments to the Bortz survey results. As demonstrated in our proposed findings and as discussed more fully below, these adjustments are supported by the record evidence and are vital to the fair and proper use of the Bortz data in determining awards.

A. Adjustment for PTV-Only Cable Systems

36. The Joint Sports Claimants agree that the Bortz survey results must be adjusted to account for those systems that were excluded from the survey because the only distant signal that they carried was a PTV signal. JSC F&C ¶ 88; Tr. 464 (Trautman) ("there's clearly a value to be assigned to those systems"). However, the two methods proposed by JSC for making this adjustment are based not on relative marketplace value but rather on the amount of fees generated -- in one method, fees generated by the carriage of all distant PTV stations; in the other method, fees generated from those systems whose only distant signal was PTV.¹² JSC F&C ¶¶ 89-92. As discussed in ¶¶ 4-20, above, the use of fees-generated formulas do not reflect relative marketplace value and, accordingly, have been repeatedly rejected in these proceedings. This Panel should similarly reject the JSC adjustments as not reflective of the relative marketplace value that the Bortz survey purports to measure.

37. The Joint Sports Claimants take issue with Dr. Fairley's assignment of a 100 percent value (in Method 3) and a high value (in Method 2) to PTV-only systems excluded from the Bortz survey. JSC F&C p. 18, ¶ 95. But, as Dr. Fairley testified, assigning such high relative values is "the right thing to do" when no other program categories are carried as distant signals. Tr. 10651-52 (Fairley). Assigning a 100 percent value to PTV (and zero values to the commercial categories) when PTV was the only distant signal carried is

¹² In applying his fee-generated methodology, JSC's witness Mr. Trautman credits PTV with only 0.25 DSE for the PTV-only systems, JSC F&C ¶ 91, even though he and various other witnesses conceded that the actual value to the cable operator of a distant PTV signal could be higher than that. See ¶ 9, above. JSC's justification for this approach -- that it removes purported distorting effects caused by cable systems carrying only a partially distant PTV signal against their will -- is unsupported by the record evidence; JSC simply assumes, without proof, that the cable operators at issue (i) had their head-ends within the must-carry zone and (ii) would not have carried the PTV signal in the absence of must-carry regulations. See ¶¶ 30-35, above, and PTV F&C ¶¶ 77, 81, 235, 487.

simply the mirror image of Bortz's assignment of a zero value to PTV and a combined 100 percent value to the non-PTV categories when only a commercial distant signal was carried.¹³ See PTV F&C ¶ 162.

38. JSC also faults Dr. Fairley for his use of unweighted Bortz data in calculating his PTV-only adjustments. JSC F&C ¶ 96. However, Dr. Fairley testified that he chose to use unweighted data because the difference between unweighted and royalty-weighted shares was insubstantial and it was a more efficient way to proceed. Fairley R.T. 9 n.6; Tr. 10621-27 (Fairley). Moreover, in response to JSC counsel's questioning regarding whether the use of unweighted data created a "multiplier effect" that carried through Dr. Fairley's various adjustments and improperly inflated PTV's share, Dr. Fairley explained that the PTV-only adjustment was "completely independent of the Bortz share. It has to do with introducing 12 additional PTV-only systems and seven Canadian-only systems, and adding those shares appropriately into the mix. So it's not a multiplicative adjustment." Tr. 10627 (Fairley). Furthermore, contrary to JSC's assertion that the PTV-only systems paid "comparatively minimal royalties" (JSC F&C p. 18), in fact those systems paid more in royalties on average than the average of all Form III systems from which Bortz sampled in 1998 and 1999. Fairley R.T. 15-16.

B. The WGN Adjustment

39. Both the Joint Sports Claimants (JSC F&C pp. 18-19, ¶¶ 108-112) and Program Suppliers (PS F&C pp. 221-23) criticize Dr. Fairley for reducing the Program Suppliers' Bortz share for each respondent that carried WGN by the percentage of non-compensable programming time on WGN (with smaller adjustments being made for systems carrying other commercial distant signals in addition to WGN). But, as Dr. Fairley testified, "[a]lthough [he] used time to make the adjustment, it doesn't necessarily mean time is the only value." Tr. 9944-45 (Fairley). Dr. Fairley used time to make the adjustment because of the limited data available and the fact that it was impossible to discern from that data whether the cable operator valued the substituted programming on the national WGN feed more or less

¹³ JSC's speculation that some 20 percent of the PTV-only cable systems might have carried the PTV distant signal only because of must-carry rules (JSC F&C ¶ 95) is unsupported by evidence in the record. See ¶¶ 30-35, above. Moreover, JSC fails to mention that the Bortz survey requires cable operators to value the commercial distant signal programming that they carry at 100 percent (*i.e.*, all the commercial program categories combined must equal 100 percent), even when that programming is carried on independent and network stations that are also subject to must-carry regulations (PTV F&C ¶¶ 73-74). In 1998 and 1999, nearly half of the instances of carriage for non-superstation independents (the category that includes JSC's vaunted Fox stations) were partial. Hazlett D.T. App. D (showing also that approximately 42 percent of network station instances of carriage were partial in 1998-99). And while the fact of partially distant carriage does not reveal whether a station is carried because of must-carry regulation, any inference that JSC seeks to draw from partially distant carriage of PTV signals would apply with even more force to independent and network commercial signals.

than the compensable programming originating on the local feed. Given that the valuations "could have gone either way," a neutral and proportional time-based reduction measure was the best option available from a statistical standpoint. *See* Tr. 9944-47 (Fairley). The adjustment did not equate "time" with value but rather used time as a benchmark for adjusting the valuations given.

40. A reduction in the Program Suppliers' share clearly is required to account for the fact that cable operators responding to the Bortz survey were not made aware of the substituted programming on WGN and were not instructed to exclude such non-compensable programming from their responses. PTV F&C ¶ 181. For the same reasons that the Bortz survey excluded non-compensable network programming from cable operators' valuations of network distant signals, the responses should not have included valuations of non-compensable programming on WGN. Fairley R.T. 18; Johnson R.T. 17-18. Dr. Fairley's WGN adjustment is a neutral approach that provides the best approximation possible, on this record, of the effect of the valuation of non-compensable programming on Program Suppliers' Bortz share. Failing to adjust for the WGN bias -- particularly given that WGN is by far the most widely carried distant signal¹⁴ -- would result in a Bortz share for Program Suppliers far in excess of the true relative value of their programming. PTV F&C ¶¶ 179-223, 482-485.

41. The Program Suppliers take JSC's arguments against the WGN adjustment one step further, asserting that it is "highly likely" that the Bortz respondents were aware of the substituted programming on WGN and would have taken that fact into account in their responses. PS F&C pp. 221-23. But cable managers responding to the Bortz survey were not told that the survey was being done for the purpose of allocating royalties under the compulsory license and therefore would have had no reason to adjust their responses to exclude non-compensable programming (Tr. 524-27 (Trautman)) -- even if, contrary to the evidence, they knew which programs on WGN were substituted and which were not. Cable operator Michael Egan testified that respondents to the Bortz survey would not make any distinction between compensable and non-compensable programming on distant signal WGN -- "It's just WGN to me." Tr. 1339-41 (Egan).¹⁵

42. Based on the inspection of a single week's schedule for both the local and national WGN feed (PTV Exs. 12-X and 13-X), the Joint Sports Claimants assert that Dr.

¹⁴ In contrast, in 1990-92, WGN was not the most widely carried distant signal and the percentage of substituted programming on its national feed was not nearly as great during those years. *See* JSC F&C ¶ 107; 90-92 PTV F&C ¶¶ 15, 106; PTV F&C ¶ 58. This may explain why none of the parties focused on the need for an adjustment during the 1990-92 proceeding.

¹⁵ Program Suppliers' argument that Dr. Fairley should have reduced PTV's Bortz share to account for the fact that PTV programming is only on 20 hours a day is similarly misguided. Unlike with WGN and the network affiliates, all of the programming on PTV stations is compensable, and therefore PTV's relative valuation would not be affected by any valuation of non-compensable programming and would be the same regardless of the number of hours that the PTV station was on the air. *See* Tr. 9948-49 (Fairley).

Fairley's "straight-line" adjustment for WGN is flawed because the compensable programming was shown in prime-time during the week, while the non-compensable programming was shown during other parts of the day. JSC F&C ¶ 110. A close examination of these schedules, however, reveals that the volume and variety of non-compensable, substituted programming eclipses that of the compensable programming, and that the substituted programming could easily serve as the basis for the cable operator's valuation of Program Suppliers' programming carried on WGN. For example, on just one day, March 8, 1999, more than a dozen Program Supplier programs were shown as substitutes on distant signal WGN, including: TINY TOON, ANIMANIACS, PINKY & THE BRAIN, BATMAN/SUPERMAN, ANDY GRIFFITH, EMPTY NEST, COACH, WEBSTER, CHARLES IN CHARGE, SAVED BY THE BELL, FAMILY MATTERS, MACGYVER, and IN THE HEAT OF THE NIGHT. In contrast, only five compensable Program Supplier programs were shown: two in primetime (7TH HEAVEN and HYPERION BAY), one between 5:00 and 6:00 p.m. (FULL HOUSE), and the other two (MATLOCK and HAWAII FIVE-O) between 3:00 and 5:00 a.m. Thus, rather than undermining Dr. Fairley's adjustment methodology, the WGN schedules in evidence confirm the reasonableness of his approach. Compare PTV Exs. 12-X and 13-X.

C. Method 1

43. The Joint Sports Claimants argue that Dr. Fairley's Method 1 should be rejected because it was based on a "fundamentally flawed premise" that all cable operators, regardless of whether or not they carried a PTV signal, were permitted to provide an answer identifying PTV in response to the preliminary Bortz survey questions as to the program categories that were "most popular" and "most often used" in advertising. JSC F&C ¶ 100. In fact, however, while Dr. Fairley conceded that he was mistaken in his belief that all cable operators were asked about PTV in the preliminary questions -- a belief that arose from flawed data initially produced by JSC (Tr. 10658-59 (Fairley)) -- he went on to testify that this point had no bearing on the results of Method 1 and did not undermine his opinion that the results of Method 1 (along with those of Method 3) should be used by the Panel in making its final award determinations. See Tr. 10006, 10414-16, 10603-05, 10619, 10658-59 (Fairley).

44. Specifically, while Dr. Fairley initially agreed that his results under Method 1 rested on his understanding that all cable operators were asked about PTV in the preliminary questions (Tr. 10002-03 (Fairley)), he realized upon reflection that that answer was incorrect and that he needed to revise his testimony. Dr. Fairley's final conclusion was that it made "no numerical difference" that cable systems that did not carry PTV were not asked to value PTV programming -- "whether they had been asked or hadn't been asked, you expect exactly the same answer. And I use exactly the same denominator and numerator, and there is no difference -- effect of that difference." Tr. 10603-04 (Fairley); see also Tr. 10414-16 (Fairley). Dr. Fairley reasoned that a system that did not carry a distant PTV signal would

not be expected to identify PTV as "most popular" or "most often used" in advertising, therefore making it irrelevant whether it was asked or not. Tr. 10416, 10604-05 (Fairley).¹⁶

45. The Joint Sports Claimants also assert that Dr. Fairley's Method 1 is "statistically dubious" because of its reliance on responses subject to wide confidence intervals. JSC F&C ¶ 102. One would have expected that JSC would have raised this point with Dr. Fairley in cross-examination; after all, who better to address such charges of statistical dubiousness than a statistician of Dr. Fairley's credentials. Fairley R.T. 1. But counsel for JSC did not pursue this line of questioning, and there is no support in the record for their assertion. What JSC fails to mention is that Dr. Fairley accounted for any uncertainty associated with Method 1 by providing the standard errors for that method at page 58 of his written rebuttal testimony. The standard error for PTV under Method 1 is ± 1.5 percentage points. Fairley R.T. 58.

D. Method 2

46. The Joint Sports Claimants merge their discussion of Dr. Fairley's Methods 2 and 3 under one heading (JSC F&C ¶¶ 103-05), but confine their criticisms largely to Method 2, ignoring the fact that Method 3 is based on a fundamentally different approach that avoids those same criticisms. Specifically, JSC focuses its discussion on the purported flaws of valuing programming not actually carried, even though Method 3 does not place any value on such programming and was designed to address that precise issue. JSC's analysis thus gives the mistaken impression that the purported flaws in Method 2 apply to Method 3 as well. To avoid similar confusion, we address Methods 2 and 3 in two separate sections.

47. The primary criticism leveled against Method 2 is that it places value on PTV programming not actually carried. *See* JSC F&C ¶ 103; PS F&C p. 223. However, as addressed in PTV F&C ¶ 205, this criticism is not justified:

- The Bortz survey does not by its method confine the answers solely to what cable operators actually carried and instead is asking for a "dominant impression" that is tied only loosely to what was actually carried. Tr. 581, 10315-21 (Trautman).
- In any event, whatever the Bortz method, Dr. Crandall testified that the mix of programming in the hypothetical marketplace could and likely would be different in some respects from what one sees in the "regulated marketplace." Tr. 10204-05 (Crandall). This supports the view that valuation decisions should not be tied strictly to actual carriage decisions in the current marketplace. *See also* 1989 CRT Decision, 57 Fed. Reg. at 15296 (Mr. Bortz testified that "when a cable operator who has a certain

¹⁶ Dr. Fairley further testified that his Method 1 results were conservative, in that they did not include PTV-only systems -- the very systems that would most likely identify PTV as "most popular". Tr. 10416-17 (Fairley).

budget allocation in mind goes into the marketplace, he or she may encounter surprises -- some programs being cheaper, others being more expensive -- so that the marketplace result will be different than the buyer's initial allocation.").

- Implicit in the Bortz method of applying an automatic zero to PTV when it is not carried is the premise that PTV would be underrepresented in the allocation of funds paid by Form 1 and Form 2 systems or in the minimum fees paid by Form 3 systems. In effect, these various funds, which are not generated by distant signals actually carried, would under the Bortz methodology be allocated based on which distant signals were actually carried in the survey year. The resulting bias against PTV cannot be squared with the language or intent of the compulsory license provisions of the Copyright Act. *See* 17 U.S.C. § 111(d); 37 C.F.R. § 256.2.

48. The Joint Sports Claimants argue that "as a matter of law, programming that is not carried on a distant signal basis would be ineligible for royalties under the compulsory license," citing 17 U.S.C. § 111(d)(3). *See* JSC F&C ¶ 103. But here JSC confuses the eligibility to receive royalties (only those copyright owners whose programming was retransmitted on distant signals and who file a claim are eligible) with the standard used to determine share allocations among program categories -- relative marketplace value. As demonstrated at ¶¶ 47 and 51, the relative marketplace value of a particular program category in a hypothetical marketplace is not necessarily tied to actual carriage.

49. Moreover, by recognizing the biasing effect of the Bortz automatic zero methodology, the CRT in the 1983 and 1989 proceedings implicitly acknowledged the need to consider valuations of PTV programming not actually carried. 57 Fed. Reg. at 15299 ("lack of opportunity for those cable systems that did not actually carry a distant PBS signal [to provide a valuation for PTV in the Bortz survey] was another flaw"); 51 Fed. Reg. at 12809-10 ("automatically accord[ing] PBS a zero valuation when the system did not, [in] fact, carry a PBS distant signal in 1983 was improper").

50. The 1990-92 CARP observed that the Bortz constant sum question -- "What is the relative value of the type of programming actually broadcast in terms of attracting and retaining subscribers" -- "is largely the question the Panel poses when it constructs a simulated market." 90-92 CARP Op. 65. Attempting to bolster their position, JSC twists this passage out of context, arguing that it stands for the proposition that what is "actually broadcast" is the defining characteristic of the hypothetical marketplace that this Panel must simulate. *See* JSC F&C ¶ 103. But if that were the case, the Bortz methodology itself would fail the test, for the following reasons:

- Because the Bortz survey is only asking for a "dominant impression" of program value, a cable operator might provide a "value" for a commercial category that it did not carry, or a disproportional value for a commercial category carried only minimally on its distant signals in the survey year. PTV F&C ¶¶ 162-166.

- “[T]he survey does not attempt to measure actual conduct other than conduct and experience that is reflected in the estimations provided by the survey respondents. Because the compulsory license system obviates arms-length negotiations for distant signal programming, the actual conduct never happens and accordingly cannot be surveyed.” Crandall D.T. 10.
- JSC seeks to use the Bortz survey to allocate royalties generated not just from systems that actually carried distant signal programming, but also from systems that carried no distant signals at all, but instead paid only the minimum fee. PTV F&C ¶ 205.

51. The argument (JSC F&C ¶ 104) that Dr. Fairley’s automatic zero adjustment is economically unsound is contradicted by JSC’s own expert economist, Dr. Crandall. While Dr. Crandall did testify that actual choices made by cable operators were important in market analysis, *see* JSC F&C ¶ 104, he also conceded that the mix of programming in the hypothetical marketplace could and likely would be different in some respects from what one sees in the “regulated marketplace.” Tr. 10204-05 (Crandall); Crandall R.T. 1 (“In an unregulated market, it is possible that the mix of programming purchased would be different from the mix purchased in the regulated market.”). Accordingly, if it is indeed this Panel’s task to simulate the hypothetical marketplace, it stands to reason that the Panel must look beyond actual carriage in the regulated marketplace in determining what would happen if the compulsory license were removed and cable operators could freely purchase distant signals.

52. The Joint Sports Claimants’ final criticism of Method 2 -- that Dr. Fairley’s automatic zero adjustment does not allow for the possibility that cable operators might value programming on commercial signals not carried (JSC F&C ¶ 105) -- is rebutted at PTV F&C ¶¶ 199-200. In each instance where a cable operator carried at least one distant commercial signal, the Bortz survey asked that cable operator to value all of the commercial programming categories, even if a particular category was not carried or would not have been carried in the hypothetical unregulated marketplace. Cable operators were also permitted to give a value that was substantially lower or higher than the amount and value of the programming actually carried on particular distant signals. PTV F&C ¶¶ 164-166. Thus, in contrast to PTV, no automatic zeroes were given to any commercial category. Dr. Fairley’s objective was to estimate the values of particular categories -- not the values of particular signals -- and thus the fact that for every cable operator there were numerous commercial and PTV signals that it did not carry was irrelevant to his analysis (just as it was irrelevant to the Bortz analysis). PTV F&C ¶¶ 199-200.

E. Method 3

53. Method 3 takes a different approach from Method 2 because it does not involve the estimation of values for signals or categories not actually carried.¹⁷ Accordingly, the criticisms that JSC has leveled against Method 2 simply do not apply to Method 3.

54. Under Method 3, program categories that fell below the threshold for carriage -- including PTV -- were given a zero. The Method 3 approach accepts the automatic zero methodology used by Bortz but applies it consistently to all program categories, not just to PTV. In doing so, the method addresses the concerns raised by the CARP in its 1990-92 decision, by Mr. Trautman in his testimony, and by JSC in its proposed findings. *See* PTV F&C ¶¶ 206-216.

55. Despite the clear differences between Methods 2 and 3, JSC lumps the two methods together in its discussion, asserting, without support, that the "de-valuation" of programming actually carried (*i.e.*, the assigning of a zero value to commercial (and non-commercial) categories that fell below the threshold for carriage) is somehow inconsistent with the hypothetical marketplace that this Panel is to construct and is "infirm as a matter of law." *See* JSC F&C ¶ 103. JSC's arguments are without merit, for the following reasons:

- By assigning zero values to commercial and non-commercial categories that fell below the threshold for carriage for the cable system at issue, Method 3 adjusts the Bortz results so that they accomplish what JSC asserts is the purpose of the hypothetical market being constructed -- to determine the relative value of the program categories being retransmitted in terms of attracting and retaining subscribers. There is no issue, as in Method 2, with estimating values for programming not actually carried.
- In order to treat the PTV and commercial categories consistently, Dr. Fairley had to assign zero values to commercial categories when they were not carried or would not have been carried in the hypothetical marketplace, given that Bortz assigned PTV a zero value when it was not carried and would not have been carried in the hypothetical marketplace. PTV F&C ¶¶ 209-10.
- Contrary to JSC's suggestion, the fact that the Copyright Act provides that only those copyright owners whose programming was retransmitted on distant signals are eligible to receive royalties does not render Method 3 "infirm as a matter of law." Indeed, Method 3 was designed specifically to focus on valuing only that programming that was actually retransmitted by cable operators. And, as noted earlier in ¶ 48, the standard for eligibility to receive royalties is different from the relative marketplace value standard used to determine share allocations among program categories.

¹⁷ The criticisms of Method 2 also do not apply to Method 1, which is a separate and independent method for determining share values.

56. Finally, the Joint Sports Claimants argue that, by not taking into account commercial signals not actually carried, Dr. Fairley's Method 3 adjustments "fail the very purpose they were intended to correct -- the equal treatment of all program categories." JSC F&C ¶ 105. But Method 3 does in fact treat all programming categories equally -- both PTV and commercial signals not actually carried by the cable operator are excluded from the analysis (just as the Bortz survey does not ask respondents to value any signals that they do not carry). Fairley R.T. 43-50. JSC's argument on this point confuses Method 3 with Method 2.

VI. THE CRITICISMS LEVELED AGAINST DR. JOHNSON'S SUBSCRIBER INSTANCES APPROACH ARE UNSUPPORTED BY EVIDENCE IN THE RECORD.

57. In addition to the Nielsen viewing shares and adjusted Bortz results that prior panels have relied upon in determining PTV's share, the results of Dr. Johnson's subscriber instances analyses further support PTV's requested award of 12 percent of the Basic Fund. See PTV F&C ¶¶ 225-247.

58. Contrary to the assertions of JSC and Program Suppliers (JSC F&C ¶¶ 202, 209-10; PS F&C p. 213), Dr. Johnson's subscriber instances calculations are not mere time or volume measures, in that they (i) explicitly take into account the relative valuation between PTV and non-PTV subscriber instances of carriage, (ii) reflect actual choices of cable operators to carry distant PTV signals, (iii) adjust for the number of subscribers receiving distant PTV and non-PTV signals, and (iv) take into account the difference between partially and fully distant signals. PTV F&C ¶¶ 234-40, 247. Dr. Johnson's analyses thus are different from the volume measures referenced in prior proceedings, which were not weighted by the number of distant subscribers and, more importantly, did not look beyond carriage or time to consider the relative value of different signals.

59. Dr. Johnson's first step in his most recent subscriber instances analysis was to adjust the 1998-99 subscriber instances data to exclude the non-compensable portion attributable to (i) substituted programming on WGN and (ii) network programming on network affiliates. PTV F&C ¶ 239. As Dr. Johnson testified, these adjustments were necessary so that the results of his subscriber instances methodology could be compared to the Nielsen viewing shares and adjusted Bortz survey results, both of which excluded network programming and non-compensable programming on WGN. Johnson R.T. 6; Tr. 9185 (Johnson).

60. The adjustments are not, as JSC contends, simply an "arbitrary schedule of the value of importing a distant signal" (JSC F&C ¶ 208). Unlike the DSE schedule established by Congress and referenced by JSC, the subscriber instances calculations submitted by Dr. Johnson reflect actual choices of cable operators, weighted to exclude non-

compensable programming based on specific evidence and data in the record. *See* Johnson R.T. 7 nn.1-2.¹⁸

61. Dr. Johnson's subscriber instances approach rests on his opinion that in 1998-99 the value of a PTV subscriber instance to a cable operator was, on average, roughly the same as (*i.e.*, at or near parity to) the value of a non-PTV subscriber instance. PTV F&C ¶ 241. This opinion is not just hypothetical conjecture, as asserted at JSC F&C ¶¶ 211-220, but rather is supported by substantial evidence in the record, including:

- 92.4 percent relative valuation between PTV and non-PTV subscriber instances implied by the most recent litigated award. PTV F&C ¶¶ 242-244.
- Strong avidity of PTV viewers for PTV programming. PTV F&C ¶¶ 430-436.
- Public Television offers the "best of the best" of the types of programming that it carries; non-PTV distant signals offer programming that is generally not as attractive as the same type of programming shown on cable networks, local network stations, and premium channels. PTV F&C ¶ 245.
- PTV's Nielsen viewing shares (18.6 percent including sports; 14.2 percent excluding sports) are roughly comparable to PTV's share of adjusted subscriber instances. PTV F&C ¶¶ 251-256.
- PTV's adjusted Bortz shares (8.5 to 13.9 percent) are also roughly comparable to PTV's share of adjusted subscriber instances. PTV F&C ¶ 577.

62. Contrary to JSC's assertions (JSC F&C ¶¶ 213-214), the Bortz results, as adjusted by Dr. Fairley, confirm that parity or near parity exists between PTV and non-PTV subscriber instances. Dr. Fairley's adjusted PTV Bortz shares of 8.5 to 13.9 percent are consistent with the Dr. Johnson's subscriber instances shares of 14.1 to 14.6 percent. Comparing these subscriber instances shares with PTV's 2.9 percent raw Bortz share or Mr. Trautman's 3.5 percent adjusted PTV share is a meaningless exercise, given that the Bortz shares proposed by JSC do not reflect the true relative value of PTV signals unless adjusted to correct for the biases identified by Dr. Fairley. *See* PTV F&C ¶¶ 160-220.

¹⁸ Dr. Johnson also reduced the PTV share of subscriber instances to account for the fact that the average PTV station retransmitted as a distant signal was on the air for 20 hours per day. PTV F&C ¶ 239. He based this adjustment on actual data from Dr. Fratrik's time study, Johnson R.T. 7 n.2, and therefore his 20-hour estimate is more accurate in this context than the 18-hour-a-day general estimate to which JSC refers (JSC F&C ¶ 206 n.45). In any event, the two hour difference in the estimates is inconsequential, in that Dr. Johnson testified that his adjustment for off-air time on PTV was conservative because no similar adjustment was made to account for distant commercial signals that were on the air for less than 24 hours a day. Tr. 9112 (Johnson).

63. The Joint Sports Claimants argue that Dr. Johnson "agree[d] that [a comparison of the Bortz allocations with his hypothetical notions of parity] would show that most cable operators generally do not value PTV at parity with commercial television." JSC F&C ¶ 214. In support of this position, JSC cites an answer by Dr. Johnson that was clearly made only "within [the] context of [a] discussion" with JSC counsel. See JSC F&C ¶ 214, citing Tr. 9264-65 (Johnson). JSC fails to cite the previous page of the transcript in which Dr. Johnson indicated that he thought counsel's line of questioning regarding the use of raw Bortz shares to show parity was "flawed" and that he had "severe reservations about this whole approach to the measure of parity." Tr. 9263 (Johnson). Dr. Johnson explained that there was a clear bias in comparing the Bortz valuations for PTV, which occupies an entire broadcast signal, with the valuations for the six commercial programming categories. Tr. 9304-15 (Johnson). The approach advocated by JSC was an "apples and oranges comparison" that was "in the end meaningless." Tr. 9307-08 (Johnson).¹⁹

64. The Joint Sports Claimants further assert that Dr. Johnson's conclusions regarding parity are undermined by the duplication of PTV programming when more than one PTV signal was carried by a particular cable system. See JSC F&C ¶¶ 217-18. But Mr. Fuller testified that the level of such duplication was minimal in 1998-99 and that parents and other subscribers value the scheduling and program diversity that multiple PTV signals provide. PTV F&C ¶¶ 412-419. Moreover, the "parity" to which Dr. Johnson refers is an average parity in the value of PTV and non-PTV signals; there are certainly circumstances where a particular PTV instance of carriage might be valued by the cable operator at a level much lower or much higher than the value of a particular non-PTV instance of carriage. See Johnson D.T. 18-19; Johnson R.T. 3-5. Also, while a second or third PTV signal would be less valuable to a cable operator than the first PTV signal, the same holds true for commercial signals in a market saturated with syndicated series, movies, and sports programming, and where there is a 70 to 80 percent probability that a syndicated program carried on a distant signal would duplicate the same syndicated program also found in the local market. See PTV F&C ¶¶ 40-41, 87-98, 245.

65. In his direct testimony, Dr. Johnson used PTV's 1990-92 award as an "anchor" for estimating PTV's 1998-99 award based on changes in PTV's share of subscriber instances. The Joint Sports Claimants contend that that methodology, if applied in earlier proceedings, would have resulted in lower royalty shares for PTV (JSC F&C ¶ 203), and that past decreases in instances of carriage were not accompanied by similar decreases in PTV's award (JSC F&C ¶ 204). In making these claims, however, JSC ignores the following facts:

¹⁹ Dr. Johnson testified that had cable operators been asked to value separately the specific types of programming on PTV signal(s) -- e.g., children's programming, history programming, news programming, etc. -- rather than value the entire signal -- the combined value for PTV programming would have been different. Tr. 9309 (Johnson). Conversely, had cable operators been asked to value the entire commercial signal(s) that they carried, rather than just the programming on those signals, the results would have "certainly [been] different" (Tr. 9314 (Johnson)) and perhaps more meaningful in assessing the relative valuation of subscriber instances.

- Dr. Johnson clearly explained why he chose the 1990-92 award as his anchor, rather than the 1978 or 1989 awards as posited by JSC counsel: "Because that was the most recent award set in an environment that more closely resembles today's environment than did the environment of 1978. In any kind of extrapolation, it becomes increasingly difficult to come out with a reliable endpoint where many, many changes occur in the meantime, more difficult to extrapolate from 1978 to 1998 than from the shorter period of the early '90s." Tr. 3844-45 (Johnson).
- Dr. Johnson testified that the royalty determinations for years prior to 1990-92 were made in "a radically different environment." Tr. 3771-73 (Johnson). Significantly, between 1983 and 1990, the Syndex Fund grew to a level greater than the Basic Fund itself, causing distortions in PTV's share of basic fund subscriber instances. See Tr. 3771-80; JSC Ex. 31-X.
- Contrary to JSC F&C ¶ 204, the CRT in 1989 did place substantial weight on a decrease in instances of carriage as a basis for reducing PTV's award. See 57 Fed. Reg. at 15303 (relying in part on decrease in PTV instances of carriage from 7.6 percent to 7.4 percent).
- PTV's share of total distant subscriber instances was higher in 1998-99 than at anytime in the 20-year history of these proceedings, almost doubling from what it had been on average between 1992 and 1998. See PTV F&C ¶¶ 231-233; JSC Ex. 31-X.²⁰

66. Dr. Johnson's initial estimates, while being superseded by the adjusted estimates he provided in rebuttal, nevertheless provide further support for an award to PTV in the range suggested by PTV's Nielsen viewing shares and adjusted Bortz shares. See PTV F&C ¶¶ 243, 607-608.

VII. CLARIFICATIONS OF MISCELLANEOUS ISSUES.

Both the Joint Sports Claimants and the Program Suppliers raise several miscellaneous issues that are not of decisional importance but that should be briefly addressed to clarify the record.

A. Supply Side Considerations Are Irrelevant in this Proceeding.

67. Despite proposed findings and testimony from its own witness that the Panel should not consider the supply side, JSC nevertheless contends that considering the

²⁰ Because of the distortions caused by the Syndex Fund in 1983-89, the most useful historical comparisons are not those proffered in JSC F&C ¶ 203 but rather involve comparing the shares of PTV subscriber instances as a percentage of total (not basic) distant subscriber instances. Those shares can be calculated from the following columns in JSC Ex. 31-X: PTV_SUB_INST / SS-SUBS DIST-TOT.

seller's perspective provides a basis to reduce PTV's award. JSC F&C pp. 10-11, ¶¶ 65-69, 350-353. Dr. Crandall, testifying for JSC, agreed that the supply side was not important because distant signal programming is supplied by a forced sale. Tr. 836-37 (Crandall). JSC also cites testimony from witnesses in the 1990-92 proceeding and this proceeding that establish that the compulsory license system creates a "forced sale," in which the buyer determines the price to be paid for quantities of programming that are fixed by broadcasters' programming choices. JSC F&C ¶ 68-69 (citing 90-92 testimony of Paul Much and 98-99 testimony of Dr. Andrew Joskow).

68. Furthermore, JSC wholly misconstrues the significance of its seller's perspective "evidence" for PTV. PTV's position on local must-carry legislation, taken nearly a decade before the years at issue in this proceeding, and based on the workings of a cable industry in the 1980s that was vastly different from the cable industry in 1998-99, provides nothing more than a purely speculative basis for determining its negotiating position with respect to distant signals in 1998-99. In a free market, PTV would negotiate aggressively to secure the value that it delivers in its programming in addition to offset the harm that distant retransmission causes to PTV stations and their viewers (PTV F&C ¶¶ 373-374; 90-92 Tr. 5369-73, 5426-43, 5446-55, 5527-28 (Downey)).

69. Finally, JSC suggests that owners of sports programming have no incentive for broader carriage of their programming. JSC F&C ¶ 257. The notion that owners of sports programming are indifferent to ensuring broad carriage and thus would be tough negotiators is flatly contradicted by the testimony of JSC witness Paul Tagliabue, Commissioner of the NFL, who testified that the NFL would not license a programming package to a broadcast network without national coverage and that cable carriage of Fox stations was important to ensuring the widest possible coverage for NFL games on Fox. Tr. 155-59, 162, 180-81 (Tagliabue).

B. Fees for Programming that Generates Advertising Revenue Do Not Measure Marketplace Value.

70. Program Suppliers contend that cable operators systematically pay higher license fees for higher rated cable networks and that this is an indication of higher marketplace value for higher rated programming. PS F&C pp. 157, 162, 177. Program Suppliers, however, are making a misleading comparison between the market for cable networks, which can generate advertising revenue for cable operators through sales of local advertising (PTV F&C ¶ 27), and the market for distant signals, which cannot generate advertising revenues (PTV F&C ¶¶ 1, 21). The simulated marketplace for distant signals should be focused on the value of signals to cable operators in attracting and retaining subscribers (PTV F&C ¶¶ 463-471), and indeed, Program Suppliers themselves recognize that cable operators retransmit distant signals in pursuit of that goal (PS F&C p. 179).²¹

²¹ A related erroneous assertion by Program Suppliers is that PTV programming "would not succeed in a free market" and thus has "a marketplace value that is dramatically lower than other program categories." PS F&C p. 213. Notwithstanding that Program Suppliers

(continued...)

71. JSC similarly contends that rights fees paid by cable networks for sports programming as well as license fees for cable networks with sports programming provide indications of marketplace value. JSC F&C pp. 27-28, ¶¶ 247-49, 257. JSC further asserts that sports programming has more marketplace value than PTV programming because sports programming rights fees are higher than PTV's programming expenditures. JSC F&C p. 30, ¶¶ 346-347. However, rights fees (and to some extent sports cable network license fees) reflect the value of programming as a vehicle for advertising because the fees are expected to be at least substantially recouped by revenues from advertising carried in the programming. Tr. 150-53 (Tagliabue). Thus, rights fees and cable network license fees provide no reference point for marketplace value in this proceeding, which is wholly concerned with the value of programming in attracting and retaining subscribers and not in generating advertising revenues. PTV F&C ¶¶ 463-471.

72. Broadcast and cable networks paid the rights fees that JSC touts because they valued the programming in terms of its ability to generate advertising revenues. Tr. 150-53 (Tagliabue). In contrast, all of the more than \$700 million expended on PTV programming in each of 1998 and 1999 was paid for programming that was intended to generate no advertising revenues whatsoever. PTV F&C ¶ 451. Accordingly, advertising-driven rights fees, as an absolute measure of value, are irrelevant to a simulated marketplace in which advertising plays no role. PTV F&C ¶ 455.

73. PTV presented its data on programming expenditures as a relative comparison between PTV programming and programming on so-called "look-alike" cable channels. PTV F&C ¶¶ 451-452. PTV used the data to illustrate that its programming is more expensive to produce -- because it is original, first-run programming that is more deeply researched and has longer production times -- than the programming on facially similar cable channels.²² PTV F&C ¶¶ 452, 545. Furthermore, PTV presented data on license fees of the "look-alike" cable networks not as an absolute measure of marketplace value when compared to the license fees of other cable networks, but to illustrate that license fees for PTV's look-alikes had increased since 1992 at a much greater rate than average cable network license fees. PTV F&C ¶¶ 453-454, 545.

(...continued)

have no evidence to support this assertion, they are focusing on an advertising-driven marketplace that has no relevance to this proceeding.

²² PTV's data also show that the gap between programming expenditures by look-alike cable channels and PTV did not "substantially" close, as JSC contends at JSC F&C ¶ 357. The data show that PTV's programming expenditures of well over \$700 million in each of 1998 and 1999 were well in excess of expenditures by "look-alikes," none of which spent more than \$300 million in either year. PTV F&C ¶ 451; PTV Ex. 1-R.

C. JSC Focuses on Trivial Changed Circumstances for PTV While Ignoring Changes that are of Decisional Importance.

74. JSC discusses several "changed circumstances" for PTV between 1992 and 1998-99 that it contends should influence PTV's award. JSC F&C p. 41, ¶¶ 354-365. JSC, however, focuses on trivial points, while ignoring much more significant changes in measures that previous Tribunals and the 1990-92 CARP found important. Among those measures of decisional importance, PTV's Nielsen viewing shares quadrupled between 1992 and 1998-99; its adjusted Bortz share increased from 6 percent in 1990-92 to an average of 10.5 percent in 1998-99; and PTV's shares of instances of carriage and Basic Fund subscriber instances both nearly doubled between 1992 and 1998-99. PTV F&C ¶¶ 580-94. Not only are the subjects of JSC's changed circumstances trivial, they are sometimes mischaracterized, and PTV addresses below several that are not addressed elsewhere in these proposed reply findings and conclusions in order to avoid any uncertainty.

75. JSC contends that PTV measures its own success by its viewers' voluntary contributions and that "under PTV's own metric, avidity for PTV declined significantly during the 1990's." JSC F&C ¶ 356. As an initial matter, JSC fails to note that while the number of households contributing to PTV may have declined slightly, the amount of contributions increased. *Compare* Lawson 90-92 D.T. 27 (1990-92 annual contributions from \$270 million to \$291 million) *with* Wilson D.T. 35 (1998-99 annual contributions of \$341 million and \$373 million, respectively). Furthermore, PTV did not present its data on the amount of donations as a quantitative measure of value, but rather as an illustration of the avidity of PTV viewers who voluntarily donated hundreds of millions of dollars for programming that they may watch for free. PTV F&C ¶ 430.

76. JSC also asserts that competition from "look-alike" cable networks has decreased the uniqueness and value of PTV programming. JSC F&C ¶¶ 360-361. The conclusion is erroneous particularly with respect to children's programming because, despite competition from cable networks such as Nickelodeon and Disney, PTV remained the only substantial source in 1998-99 for educational children's programming. PTV F&C ¶¶ 400-401, 444. Among other things, no source other than PTV provided extensive programming with educational content for school-age children. PTV F&C ¶¶ 400-01, 522-24, 541-42. Furthermore, PTV amply demonstrated that not only its children's programming but all of its programming remains unique in all of television as illustrated by its motto, "If we don't do it, who will?". PTV F&C ¶¶ 382-383, 390-395, 409-411, 438-448. The success of look-alike cable networks demonstrates that there is an audience for programming of the types shown on PTV, but for the best programming in each genre represented by the look-alikes, viewers still would turn first to PTV. PTV F&C ¶ 438-448. In contrast, sports fans would first turn to ESPN and regional sports networks rather than to sports on distant signals, and those interested in syndicated series and movies would look to many alternatives before distant signals as their preferred sources for those types of programming. PTV F&C ¶¶ 87-97, 618-623, 628-630.

D. The Unadjusted Bortz Results Fail to Reflect the Substantial Changes in the Distant Signal Marketplace between 1992 and 1998-99.

77. The Joint Sports Claimants fault Dr. Johnson for failing to quantify the size of the reduction he would expect to see in the Program Suppliers' Bortz share as a result of the conversion of WTBS to a cable network. *See* JSC F&C ¶¶ 75-79. But the purpose of Dr. Johnson's testimony was not to quantify the size of the reduction but rather to explain why one would expect to see such a decline in light of the WTBS conversion. *See* Johnson R.T. 20-21; Tr. 9275-79 (Johnson). As Dr. Johnson explained, the failure of the unadjusted Bortz results to reflect this major event implies -- implausibly -- that, in relative terms, the Bortz respondents placed no value on the movies and series carried by WTBS as a distant signal -- programming for which cable operators now pay significant direct license fees. Johnson R.T. 22; PTV F&C ¶¶ 615-16. Because of this failure of the Bortz survey to adequately measure this significant change in the distant signal market, Dr. Johnson concluded that the Bortz shares needed to be adjusted if they are to be useful to the Panel. Johnson R.T. 23.

78. Dr. Johnson's testimony on this point is further supported by Dr. Ducey, who testified that the relative amount of Program Suppliers' programming on distant signals fell significantly from 1992 to 1998-99, from 78 percent to 60 percent, largely because of the WTBS switch. PTV F&C ¶¶ 65, 259-61. In addition, aside from the conversion of WTBS, other important changes took place between 1992 and 1998-99 that reduced the importance to cable operators of movies and syndicated series on distant signals, particularly the increase in the number of cable networks offering alternative and superior sources of the same type of programming. *See* PTV F&C ¶¶ 87-97, 618-623, 628-630.²³

E. Program Quality is Relevant in the Simulated Marketplace.

79. Program Suppliers misconstrue the relevance of program quality when they contend that quality is not an appropriate criterion on which to base an award. PS F&C pp. 214-15. While "quality" *per se* may not be an independent decisional factor, the CRT and 1990-92 CARP acknowledged, and the evidence in this record supports, that qualitative differences in programming are relevant to distinguishing among program categories in the simulated marketplace in which programming is valued by its ability to attract and retain subscribers. PTV F&C ¶ 459. Qualitative evidence demonstrates that when a PTV signal is distantly retransmitted it offers high value to the cable operator, and it is certainly appropriate for the Panel to consider this evidence in assessing the relative marketplace values of programming. With respect to qualitative issues, PTV has provided substantial evidence that its programming has the attributes that viewers value most highly, that its programming provides a particularly good "fit" for cable operators who need to offer programs that appeal

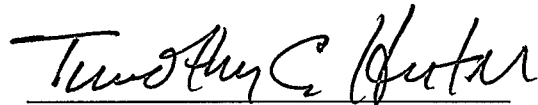
²³ PTV Exhibits 9-X and 10-X, reproduced at ¶ 14, above, illustrate the principle that the withdrawal of a signal from the distant signal marketplace (PTV Ex. 10-X removes one of the distant signals shown on PTV Ex. 9-X) results in an increase in the relative values of the other signals remaining in the pool (*e.g.*, the relative value of Signal A increases from 20 percent to 40 percent, even though its absolute value stays the same).

to a variety of subscriber interests, and that its programming provides a host of additional important benefits to cable operators. PTV F&C ¶¶ 117-123, 375-455, 506-552.

CONCLUSION

80. For the reasons set forth above and in their Proposed Findings of Fact and Conclusions of Law, the Public Television Claimants respectfully request that they be awarded a share of 12 percent of the Basic Fund for both 1998 and 1999.

Respectfully submitted,



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September 5, 2003

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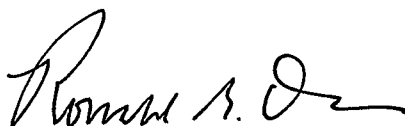
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September 5, 2003

RECEIVED

BY HAND DELIVERY

Office of the General Counsel
United States Copyright Office
James Madison Memorial Building
Room 403
First and Independence Avenue, S.E.
Washington, D.C. 20540

SEP 5 2003

GENERAL COUNSEL
OF COPYRIGHT

**Re: Distribution of 1998 and 1999 Cable Royalty Funds,
Docket No. 2001-8 CARP CD 98-99**

Dear Sir:

Enclosed please find an original, five copies, and an extra copy for date-stamping of the PROPOSED REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE PUBLIC TELEVISION CLAIMANTS in the above-captioned proceeding. The certificate of service is included following the pleading.

In accordance with the CARP's July 18, 2003 Order, we have also enclosed a CD-ROM containing the document in a format compatible with Word 97.

Please date-stamp the extra copy and return it to the waiting messenger.

Thank you.

Sincerely,



Ronald G. Dove, Jr.

Counsel to Public Television Claimants

Enclosures